

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

CASE NO. C18-1452

Petitioner.

UNITED STATES' PETITION AND
MEMORANDUM FOR
ENFORCEMENT OF CIVIL
INVESTIGATIVE DEMAND
PURSUANT TO 31 U.S.C. § 3733 AND
TO COMPEL PRODUCTION OF
DOCUMENTS

CH2M HILL, INC.,

Respondent.

Noted for Consideration on:
October 19, 2018

INTRODUCTION

The United States is investigating potential violations of the False Claims Act, 31 U.S.C. § 3729 (FCA) by CH2M Hill, Inc. (CH2M), which overbilled the United States approximately \$8.3 million by using employees who did not meet specific labor qualifications on two Air Force Center for Engineering and the Environment (AFCEE) contracts. CH2M admits that it overbilled the United States; the central issue in the government’s investigation is whether CH2M “knowingly” failed to disclose or reimburse the United States for the overpayment, in violation of the FCA.

In May 2017, the United States served a Civil Investigative Demand (CID) on CH2M for the production of records relating to its labor qualification practices. Over the past several months, CH2M has made multiple productions in response to the CID. However, it has withheld over 300 responsive documents relating to work performed by a third-party consulting firm, Argy, Wiltse & Robinson PC (Argy), based on its assertion of the attorney-client privilege and work product doctrine. Although Argy told CH2M by September 2011 that it had used miscategorized employees on AFCEE contracts, CH2M did not report this critical information to the government until after the government started auditing CH2M's practices. Thus, discovery regarding Argy's consulting work for CH2M is directly relevant to the government's investigation into whether CH2M "knowingly" failed to reimburse the United States for an \$8.3 million overpayment. Because CH2M has not met its burden of proving that either the attorney-client privilege or the work product doctrine protects these materials from disclosure, the United States requests that the Court compel CH2M to produce all Argy-related material.

FACTS

A. Background

CH2M is an engineering, planning, economic and scientific consulting firm that regularly contracts with, and performs work for, the Federal Government, including a

1 significant number of projects for the Department of Defense (DoD).¹ CH2M's headquarters
 2 are located in Englewood, Colorado, and it has offices in Bellevue, Washington (among
 3 several other locations).²

4 In 2003 and 2008, the United States Air Force (USAF) awarded CH2M AFCEE
 5 Contract Nos. F41624-03-D-8595 and FA8903-08-D-8769 (AFCEE Contracts), respectively.
 6 Both contracts are cost-reimbursable, indefinite delivery/indefinite quantity contracts, which
 7 focused primarily on environmental projects for the USAF. The contracts included
 8 minimum education and experience requirements for specific employment positions. The
 9 total value of the AFCEE Contracts was in excess of \$900 million.

10 In December 2014, the Defense Contract Audit Agency (DCAA)—which provides
 11 audit and financial advisory services to the DoD—determined that at least five CH2M
 12 employees did not meet the labor qualifications for work performed in fiscal year 2008 under
 13 task orders that were issued pursuant to the AFCEE Contracts, and advised CH2M of its
 14 findings. By letter dated April 17, 2015, CH2M informed the Office of Inspector General of
 15 the DoD that it had “credible evidence of overpayment” with respect to its performance of
 16 the AFCEE Contracts. Ex. A at 1.³ Specifically, CH2M stated that it determined that “an
 17 unknown number of employees have been billed through time-and-materials (“T&M”) task
 18 orders under [the AFCEE Contracts] in labor categories for which they did not meet one or
 19 more minimum qualification stipulated by those contracts.” *Id.* at 2.

20 CH2M retained PriceWaterhouseCoopers LLP (PwC) to perform an analysis of the
 21 impact of the labor qualification issue on the AFCEE Contracts. In April 2016, CH2M
 22 provided the results of PwC's analysis to DCAA, which concluded that from 2003-2014,
 23 CH2M overbilled the USAF approximately \$8,323,179 on the AFCEE Contracts. In August
 24 2017, CH2M agreed to repay the government for this overpayment. *See* Ex. B.

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¹ Jacobs Engineering Group Inc. acquired CH2M Hill on December 18, 2017. *See* <https://www.ch2m.com/newsroom>.

² *See* <https://www.ch2m.com/locations/united-states>.

³ Exhibits A-R are attached to the Declaration of David R. East, filed herewith.

1 **B. CH2M's Retention of Argy to Perform Consulting Services**

2 Four years before DCAA determined that CH2M miscategorized employees on
 3 AFCEE contracts, CH2M retained Argy in 2010 to perform a “GAP ANALYSIS AND
 4 BUSINESS SYSTEMS REVIEW” to provide “reasonable assurance that [CH2M’s]
 5 Business Systems are compliant and effective in performing the Federal Government’s
 6 contracts.” Ex. C at CH2M-00000138, CH2M00000141.⁴ Argy’s review included an
 7 analysis of CH2M’s compliance with labor qualification requirements on government
 8 contracts, and recommendations for improving the same. *See* Ex. A at 7 (“The results of this
 9 review included a recommendation to CH2M that it enhance its procedures for ensuring that
 10 employees meet labor qualification requirements on T&M contracts.”).

11 **1. Services Purchase Order 942452**

12 CH2M retained Argy pursuant to a contract designated as Services Purchase Order
 13 942452 (PO 942452). *See* Ex. C. CH2M and Argy executed PO 942452 on November 1 and
 14 4, 2010, respectively. *See* Ex. D at CH2M-00000293. Non-lawyers signed the agreement on
 15 behalf of both parties. *See id.* at CH2M-00000293. PO 942452 identifies two non-lawyers
 16 as CH2M’s primary points of contact for performance of the contract, and a Contracts
 17 Manager as the “BUYER” for CH2M. *Id.* at CH2M-00000292-293.

18 PO 942452 does not indicate that CH2M retained Argy to assist with legal matters, or
 19 that its work would be under the auspices of privilege. The “Scope of Services” indicates
 20 that Argy’s role was to perform “select Business Systems reviews and reviews of associated
 21 internal controls as part of [CH2M’s] Federal Government contract compliance program.”
 22 Ex. C at CH2M-00000140. The “end goals” of the engagement were to provide CH2M (1)
 23 “reasonable assurance that its Business Systems are compliant and effective in performing
 24 the Company’s Federal Government Contracts”, and (2) “the infrastructure and foundation
 25 necessary to assess compliance with a broad array of Federal Government contract

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 27 ⁴ Argy was acquired by BDO LLP USA in 2012. *See* <https://www.bizjournals.com/washington/news/2012/10/10/cpa-firm-bdo-acquiring-argy-wiltse.html>. A “gap analysis” is an analytical method that compares a company’s actual performance with its expected, or potential performance.

1 regulatory, statutory and systems requirements.” *Id.* at CH2M-00000141, 146. PO 942452
 2 did not indicate that Argy would be working with CH2M’s in-house counsel. *See generally*
 3 *id.*

4 PO 942452 contains a “Nondisclosure” provision that prohibits Argy, for a period of
 5 five years, from disclosing information that CH2M identifies as “proprietary or
 6 confidential.” *See* Ex. C at CH2M-00000159, ¶ 15.0. The provision does not reference
 7 attorney-client privileged communications or attorney work product. *See id.*

8 **2. “Supplement to Scope of Work – Purchase Order #942452”**

9 On November 8, 2010—a week after it signed PO 942452—CH2M asked Argy to
 10 sign a letter “acknowledg[ing] that ARGY is being engaged and retained by the Legal and
 11 Insurance Department of CH2M to perform the services specified in the Scope of Work.”
 12 Ex. E at CH2M-00000179-180. Attached to the letter is a document entitled “Supplement to
 13 Scope of Work – Purchase Order #942452” (Supplement), which indicates that the purpose
 14 of the engagement is for Argy to provide “consulting services to assist with preparation for
 15 DCAA business systems audits and leveraging our current compliance approach into a
 16 formal government compliance program.” *See id.* at CH2M-00000186. The Supplement
 17 states that Argy’s work will be “at the direction and under the sole supervision of CH2M
 18 HILL’s Legal and Insurance Department,” but clarifies that Argy will be working with
 19 CH2M’s “internal audit and government contracts compliance staff on the engagement.” *See*
 20 *id.* at CH2M-00000186-187.⁵ Like PO 942452, the Supplement does not reference attorney-
 21 client privileged communications or attorney work product.

22 **3. Performance of PO 942452**

23 CH2M’s AFCEE Contracts Manager, Sylvia Walker, described Argy’s work pursuant
 24 to PO 942452 as an “internal assessment” and “internal audit.” Ex. F at CH2M-00003505;
 25 Ex. G at CH2M-00017503. Although CH2M has produced only limited documents related
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27 ⁵ The language of the Supplement oddly suggests that it is a proposal for services even though the parties had already
 28 executed PO 942452. *See, e.g.*, Ex. E at CH2M-00000186 (“CH2M HILL seeks consulting services....”), 187 (“Please
 provide a quote for each engagement....”).

1 to Argy's performance of the PO, the documents reveal that Argy determined by no later
 2 than September 2011 that CH2M had billed USAF for multiple employees who did not
 3 satisfy AFCEE labor qualifications. *See, e.g.*, Ex. G; Ex. H at CH2M-00004097 ("The
 4 vetting was completed and communicated to Argy and internal teams Sep 22, 2011."). For
 5 example, CH2M's records indicate, "when Argy conducted an internal assessment in 2011,
 6 [CH2M] determined" its employee, Bryan Nash, "was billed incorrectly" on one of the
 7 AFCEE Contracts. Ex. F at CH2M-00003505; *see also* Ex. I. The same "Internal audit
 8 conducted by Argy" indicated that CH2M employees Audrey Huggins and Corey
 9 Schwabenlander did not satisfy AFCEE labor qualifications. *See* Ex. I; Ex. G at CH2M-
 10 00017515-17516. Although CH2M quantified the hours it had wrongly billed for certain
 11 employees on the AFCEE contracts, it did not take any steps to compensate the government
 12 for the overpayment:

13 Unless we are directed to go backwards no billing action needs to be take [sic] at this
 14 time.

15 Ex. G at CH2M-00017503 (emphasis added).

16 C. 2012 DCAA Audit

17 In 2012, DCAA asked CH2M to produce documents and information relating to
 18 Argy's performance of PO 942452 in connection with an audit. *See* Ex. J. DCAA required
 19 such information in order to evaluate whether CH2M was complying with 48 C.F.R. §
 20 252.242-7006, which mandates that a contractor's accounting system provide, *inter alia*,
 21 "[m]anagement reviews or internal audits of the system to ensure compliance with the
 22 Contractor's established policies, procedures, and accounting practices". *Id* at CH2M-
 23 00011028 (emphasis added). Although CH2M's AFCEE Contracts Manager and other
 24 employees had referred to Argy's work as an "internal audit," CH2M refused DCAA's
 25 request, claiming that it "did not retain Argy as part of its internal control system or
 26 processes, the Argy work product is not an internal audit report, nor was it developed or
 27 requested in connection with an internal audit." Ex. K at 1. (emphasis in original). CH2M
 28 further alleged that Argy's analyses were "protected by the attorney-client privilege and

1 attorney work doctrine" because they were prepared "at the direction of the CH2M HILL
 2 Legal Department in connection with a confidential matter that, at the time of the Argy
 3 engagement, the Legal Department anticipated would raise a possible dispute in the
 4 future...." *Id.* at 1.

5 CH2M's outward position to DCAA regarding the purported privileged nature of the
 6 engagement appears to have been in conflict with contemporaneous internal communications
 7 from its contracting team. To wit, on March 22, 2012, CH2M's Director of Contractor
 8 Audits confirmed that the company did not ask Argy to perform its work "under privilege":

9 [T]he letter ... indicating that Argy was retained by CH2M HILL's legal department
 10 ... does not state that the work is under privilege.

11 Ex. L (emphasis added).

12 **D. Withholding of Documents in Response to Civil Investigative Demand**

13 In May 2017, the United States served CH2M with a CID, which sought, primarily,
 14 records relating to the work that Argy performed on its behalf in 2010 and 2011. *See* Ex. M.
 15 In response to the CID, CH2M began a rolling production of over 20,000 documents, which
 16 took place over several months.

17 On August 31, 2017, CH2M provided an initial "Index of Documents Withheld Under
 18 a Claim of Privilege." Ex. N. The almost 70-page privilege log identified approximately
 19 1300 documents that CH2M claimed were protected against disclosure based on the
 20 attorney-client privilege or the work product doctrine. *See id.* Of the withheld documents,
 21 only about 250 were purportedly authored by or sent to an attorney, and approximately 650
 22 were purportedly prepared "at the direction of" counsel (or a similar statement). *See id.*⁶

23 By letter dated December 8, 2017, CH2M argued that Argy's work as a third-party
 24 consultant was protected by the attorney-client privilege and work product doctrine because
 25 "Argy was retained directly by CH2M's Legal department to conduct a privileged review of
 26 CH2M's business systems." Ex. O at 4 (emphasis added). CH2M further argued that the

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 28 ⁶ The appendix to CH2M Hill's initial privilege log identified the attorneys at CH2M Hill and Argy who were either the
 authors or recipients of the withheld documents. *See* Ex. N at 65-68.

1 Supplement “and accompanying letter clearly show that CH2M’s Legal department procured
 2 consulting from Argy to assist CH2M Legal with preparation and strategy development for a
 3 potential anticipated dispute with DCAA....” *Id.* at 4-5.

4 By letter dated January 25, 2018, the United States challenged CH2M’s privilege
 5 analysis and requested that it “immediately produce all documents related to PO 942452 that
 6 it has previously withheld on the basis of privilege.” Ex. P at 1. The United States asserted
 7 that CH2M failed to provide a factual or legal basis for its privilege claims. *See id.* at 2-5.

8 In March 2018, CH2M presented a modified privilege log, which identified a total of
 9 “318 unique documents” that it was withholding on the basis of attorney-client or work
 10 product privilege, and which fit into four separate categories:

- 11 1. Documents that involved direct discussions with counsel ... There are 83 such
 12 documents, of which 45 are presentations/reports prepared by Argy
- 13 2. Documents containing detailed excerpts or digests of Argy findings ... There are
 14 42 such documents.
- 15 3. Documents prepared by Argy and shared with CH2M, or correspondence between
 16 Argy and CH2M, that did not directly involve counsel but related to the substance
 17 of Argy’s engagement ... There are 164 documents in this category....
- 18 4. Documents and correspondence prepared by CH2M personnel directly discussing
 19 the substance of the Argy engagement and/or digesting the Argy findings ... There
 20 are 29 documents in this category....

21 Ex. Q at 2. Of the 318 withheld documents: approximately 280 were purportedly prepared at
 22 or under the direction of counsel; 49 appear to be spreadsheets; only 37 documents appear to
 23 have been received by an attorney; only 4 are explicitly identified as involving
 24 communications with counsel, and of this subset, only 2 actually purport that the
 25 communications sought legal advice; and only 2 documents appear to have been authored by
 26 an attorney. *See id.*⁷

27 ⁷ Through subsequent discussions, CH2M provided the following information: almost all of the documents withheld as
 28 “work product” were prepared by non-lawyers (Ex. R at 4, ¶ 3); each of the 45 presentations that CH2M withheld in their
 29 entirety under category 1, *supra*, was likely shared with non-lawyers (*id.* at 5-6, ¶ 7); and only some of the 45
 30 presentations withheld under category 1, *supra*, had privilege and/or work product designations or disclaimers, all of
 31 which were added by Argy—not CH2M (*id.* at 6, ¶ 8).

ARGUMENT AND AUTHORITY

A. This Court is a Proper Venue for the Petition

The United States is authorized to file a petition to enforce a CID in “any judicial district in which such person resides, is found, or transacts business.” 31 U.S.C. § 3733(j). Because CH2M has a corporate office and transacts business in this District, venue is proper.

B. The CID is Enforceable

CH2M is not alleging that the United States' CID is unenforceable. Nonetheless, the CID meets all applicable requirements for enforceability. In the Ninth Circuit, courts must enforce a CID where: (1) Congress granted the authority to investigate; (2) procedural requirements were followed; and (3) the evidence is relevant and material to the government's investigation. *See E.E.O.C. v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1076 (9th Cir. 2001) (internal citations omitted).

Here, the United States’ CID meets all applicable requirements and is enforceable. The plain language of the FCA authorizes the CID issued to CH2M. *See* § 3733(a)(1). Further, the documents that the United States seeks—records relating to the consulting work that Argy performed on CH2M’s behalf—are directly responsive and material to the United States’ FCA investigation into CH2M’s failure to disclose the overpayment.

C. CH2M's Communications With Argy Are Not Privileged

“The party asserting the attorney-client privilege has the burden of establishing the relationship and privileged nature of the communication.” *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011) (citing *United States v. Bauer*, 132 F.3d 504, 507 (9th Cir. 1997)). The Ninth Circuit has adopted an eight-part test to determine whether information is protected by the attorney-client privilege:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived.

United States v. Ruehle, 583 F.3d 600, 607 (9th Cir. 2009) (internal quotations and citations omitted). The purpose of the privilege is to protect “communications between an attorney

1 and her client made in confidence for the purpose of securing legal advice from the lawyer.”
 2 *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1069 (N.D. Cal. 2002) (citing
 3 *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996)).

4 When, as here, the purportedly privileged communications involve a third party, the
 5 general presumption is that the privilege holder is “deemed to waive the privilege by
 6 disabling itself from claiming that the communications were intended to be confidential.”
 7 *Schaeffler v. United States*, 806 F.3d 34, 40 (2d Cir. 2015); *see also Weil v. Inv./Indicators,*
 8 *Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981) (voluntary disclosure to third party
 9 waives the privilege). However, the Ninth Circuit has recognized a limited exception to this
 10 rule when the communications are “with third parties who have been engaged to assist the
 11 attorney in providing legal advice.” *Richey*, 632 F.3d at 566 (internal citations omitted); *see*
 12 *also ChevronTexaco Corp.*, 241 F. Supp. 2d at 1072, n.3 (noting that at least two Ninth
 13 Circuit decisions have cited, with approval, *United States v. Kovel*, 296 F.2d 918 (2d Cir.
 14 1961)—a seminal case on this exception). The waiver exception does not apply unless the
 15 third party’s role is “to facilitate an accurate and complete consultation between the client
 16 and the attorney.” *United States v. Judson*, 322 F.2d 460, 462-463 (9th Cir. 1963). Further,
 17 “if the advice sought is the [third-party’s] rather than the lawyer’s, no privilege exists.”
 18 *Kovel*, 296 F.2d at 922; *see also United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999)
 19 (“[T]he privilege protects communications between a client and an attorney, not
 20 communications that prove important to an attorney’s legal advice to a client.”).

21 In the present case, CH2M has failed to produce evidence that supports its assertion
 22 that documents involving, or relating to, work performed by Argy pursuant to PO 942452 are
 23 protected by the attorney-client privilege. As a threshold matter, there is no evidence that
 24 CH2M engaged Argy to assist its attorneys in providing legal advice to the company.
 25 Rather, PO 942452 plainly states that the “end goal” of the engagement was for Argy—not
 26 CH2M’s in-house attorneys—to “provide CH2M Hill reasonable assurance that its Business
 27 Systems are compliant and effective in performing the Company’s Federal Government
 28 Contracts.” Ex. C at CH2M-00000141. Neither the Purchase Order nor the Supplement

1 refers to “legal advice”; likewise, neither explicitly addresses attorney-client
 2 communications or work product. *See id.*; Ex. E.⁸ Moreover, as stated above, CH2M’s
 3 Director of Contractor Audits acknowledged that Argy’s work was not “under privilege.”
 4 Ex. L. Under *Kovel* and its progeny, these facts do not support an extension of the attorney-
 5 client privilege to Argy’s consulting work for CH2M.

6 Similarly, CH2M’s privilege log fails to establish a factual basis for the potential
 7 application of the attorney-client privilege to most, if not all, of the 318 withheld documents.
 8 Only two documents explicitly purport to relate to legal advice, and two additional
 9 documents explicitly purport to be communications with counsel. *See* Ex. Q at CH2M-
 10 00008422 (“seeking legal advice”), CH2M-00020946 (“Communication with counsel
 11 regarding Argy work product”), CH2M-00021230 (“seeking and receiving legal advice”),
 12 CH2M-00022471 (“Correspondence with in-house counsel....”).⁹ Several of the documents
 13 withheld as attorney-client privileged communications do not inherently qualify as
 14 “communications” because of the type of document (e.g., “spreadsheet”) and the fact that the
 15 privilege log does not identify a recipient, let alone an attorney involved in the
 16 “communication.” *See generally id.* Indeed, CH2M identified “Argy” as the author for at
 17 least 60 documents, with either no recipient identified, or “CH2M” listed as the recipient. *Id.*
 18 Approximately 280 of the withheld documents were purportedly created at or under the
 19 “direction of counsel,” which is insufficient to establish privilege. *See United States v.*
 20 *Davita*, 301 F.R.D. 676, 681-82 (N.D. Ga. 2014) (“Where the only information presented
 21 was an allegation in the log itself that a document was prepared or transmitted ‘at the
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24 ⁸ To the extent that P.O. 942452’s confidentiality provision applied to attorney-client privileged communications and/or
 25 work product, its restrictions on Argy’s ability to disclose such information expired 5 years from the date of Argy’s
 26 receipt of the same. *See* Ex. C at CH2M-00000159.

27 ⁹ Note, however, that all four of these communications appear to have been between CH2M employees and in-house
 28 counsel. “Because in-house counsel may operate in a purely or primarily business capacity ... the presumption that
 attaches to communications with outside counsel does not extend [to them].” *ChevronTexaco Corp.*, 241 F. Supp. 2d at
 1076. For a privilege to attach, CH2M must “make a ‘clear showing’ that the ‘speaker’ made the communications for
 the purpose of obtaining or providing legal advice.” *Id.* (quoting *In re Sealed Case*, 737 F.2d 94 (D.C. Cir. 1984)).
 Specifically, CH2M must establish that the “primary purpose of the communication was securing legal advice.” *Id.*
 (internal citation and quotation omitted).

1 direction of counsel,’ the Court generally denied the claim of privilege.”). Additionally,
 2 given the nature of the consulting work that Argy performed, and the descriptions in the
 3 privilege log (e.g., “data,” spreadsheet,” “report”), it is likely that many of the withheld
 4 documents contain factual data, which, generally, is not protected from disclosure by the
 5 attorney-client privilege. *See, e.g., Upjohn Co. v. United States*, 449 U.S. 383, 395-96
 6 (1981) (the privilege “does not protect disclosure of the underlying facts”).

7 Because CH2M has failed to establish that documents relating to Argy’s consulting
 8 work are protected by the attorney-client privilege, the United States requests that the Court
 9 compel CH2M to produce all of the documents identified as attorney-client communications
 10 in the March 19, 2018 privilege log.

11 **D. The Work Product Doctrine Does Not Apply to Argy-Related Materials**

12 “The work-product doctrine protects ‘from discovery documents and tangible things
 13 prepared by a party or his representative in anticipation of litigation.’” *Richey*, 632 F.3d at
 14 567 (quoting *Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F.2d 1486, 1494 (9th Cir. 1989)). The
 15 purpose of the work product doctrine is to “shelter[] the mental processes of the attorney,
 16 providing a privileged area within which he can analyze and prepare his client’s case.”
 17 *United States v. Nobles*, 422 U.S. 225, 238 (1975). For work product protection to apply, a
 18 document must “(1) be ‘prepared in anticipation of litigation or for trial’ and (2) be prepared
 19 ‘by or for another party or by or for that other party’s representative.’” *Richey*, 632 F.3d at
 20 567 (quoting *In re Grand Jury Subp., Mark Torf/Torf Envil. Mgmt. (Torf)*, 357 F.3d 900, 907
 21 (9th Cir. 2004)). Where, as here, the documents were not prepared exclusively for the
 22 purpose of litigation, work product protections do not apply unless, based on “the totality of
 23 the circumstances … it can fairly be said that the ‘document was created because of
 24 anticipated litigation, and would not have been created in substantially similar form but for
 25 the prospect of that litigation[.]’” *Torf*, 357 F.3d at 908 (quoting *United States v. Adlman*,
 26 134 F.3d 1194, 1195 (2nd Cir. 1998)). Here, CH2M has not met its burden of proof.

27 Neither the language of PO 942452 nor the Supplement indicates that CH2M engaged
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1 Argy for the purpose of assisting the company in preparation for litigation.¹⁰ Likewise,
 2 CH2M's privilege log does not reference that any of the documents withheld based on the
 3 work product doctrine were prepared in anticipation of litigation. Additionally, the non-legal
 4 purpose of the Argy engagement and the descriptions in the privilege log indicate that it is
 5 unlikely that any of the documents withheld under the work product doctrine were prepared
 6 because of anticipated litigation. Consequently, CH2M has not established a *prima facie*
 7 basis for work product protections. The Court, therefore, should compel CH2M to produce
 8 all of the Argy-related documents that it has withheld on the basis of the work product
 9 doctrine.

10 **CONCLUSION**

11 For the reasons set forth herein, the United States requests that this Court enforce the
 12 CID and compel CH2M to produce all of the Argy-related documents that it has withheld
 13 based on the attorney-client privilege and/or work product doctrine. Alternatively, the
 14 United States requests that the Court compel CH2M to provide all of the withheld documents
 15 for *in camera* review so that the Court may determine which documents, if any, are properly
 16 withheld.

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26 ¹⁰ At most, the Supplement states that one of the purposes of the engagement was for Argus to "assist with preparation for
 27 DCAA business systems audits." Ex. E at CH2M-00000186. Although CH2M Hill contends that Argus's work related to
 28 "a potential anticipated dispute with DCAA" (Ex. O at 5), it has not shown that any of the withheld documents were
 prepared because of anticipated litigation or that they would not have been prepared in substantially similar form but for
 the prospect of litigation.

Dated this 3rd day of October, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an employee in the Office of the United States Attorney for the Western District of Washington and is the person of such age and discretion as to be competent to serve papers;

It is further certified that on this day, I have served the foregoing document to the following non-CM/ECF participant(s), via USPS mail, postage pre-paid.

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DATED this 3rd day of October, 2018.

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